TAC CONSTRUCTION & TRADING

v.

BENNES ENGINEERING BHD

HIGH COURT MALAYA, JOHOR BAHRU
ABDUL MALIK ISHAK J
[CIVIL SUIT NO: 22-313-1998]
6 JANUARY 1999

CONTRACT: *Formation - Quotation - Whether quotation which was accepted amounted to contract - Progress and final claims delivered and acknowledged by placing of signatures - Whether party who signed bound by signatures - Whether party who acknowledged claims estopped from denying the same - Whether parties had reached an agreement*

CIVIL PROCEDURE: *Summary judgment - Purpose of - What has to be shown by defendant to resist application for summary judgment - Rules of the High Court 1980, O. 14*

CONTRACT: *Agency - Principal and agent - Contract between agent and third party - Whether principal can claim want of authority on agent to avoid honouring contract*

CONTRACT: *Consideration - Sufficiency - Whether adequacy of consideration and fairness of bargain immaterial if consideration sufficient*

The plaintiff supplied materials and performed construction works for the defendant based on certain terms included in a quotation. This quotation was sent to the defendant and to signify receipt and acknowledgment, the defendant's project manager placed his signature on the same. The defendant paid to the plaintiff certain sums of money but there was an outstanding balance still owing to the plaintiff. By reason of the defendant's failure to pay the said outstanding balance despite numerous reminders and a notice of demand, the plaintiff instituted an action claiming the balance due to it. The plaintiff then applied for summary judgment pursuant to O. 14 of the Rules of the High Court 1980. The senior assistant registrar entered judgment against the defendant and it was against this that the defendant appealed.

The plaintiff's case was that there was a contract on a quotation basis subsisting between the parties. In support of its contention, several progress and final claims served by hand and received and acknowledged by the defendant were submitted. The defendant, on the other hand, asserted that the terms of the contract were oral in nature and that there were terms and conditions of engagement between the parties which had to be observed but

which were not so observed. However, payments already paid to the plaintiff were so paid despite the failure to comply with the said terms and conditions of engagement.

Additionally, the defendant sought to portray itself as an agent. This was based on the said terms and conditions of engagement which required the defendant to submit the plaintiff's claim to a consultant for certification before the client/owner made payments to the defendant who, in turn, would transmit the same to the plaintiff.

Held:

[1] In an O. 14 application, a defendant need only raise one triable issue acceptable to the court to enable him to defend the suit. An O. 14 application cannot be granted where the defence raises a plausible dispute. But where the facts are clear and undisputed and, the only issue raised is a question of law, it is proper that it be dealt with in an O. 14 application.

[1a] An O. 14 application is to enable a plaintiff to obtain a summary judgment without trial provided: (i) the plaintiff can prove his claim clearly; and (ii) the defendant is unable to set up a *bona fide* defence or raise an issue against the claim which ought to be tried.

[1b] A judge must not only be satisfied that there is no defence but must also be satisfied that there is no fairly arguable point to be argued on behalf of the defendant and having so satisfied himself on these points, it is the judge's duty to give judgment to the plaintiff.

[1c] There will be a fairly arguable point to be argued if the defence can raise serious questions of law or fact to resist the plaintiff's claim or it is apparent to the court, though the defence is not able to pinpoint any precise issue or question in dispute which ought to be tried, that for some reason there ought to be a trial.

[2] All the progress and final claims showed that the parties had finished reaching an agreement and the only thing left for the plaintiff to do was to collect the payments thereto.

[3] Consideration provided must be sufficient and must be capable of expression in economic terms. If what is given in exchange for the promise has value in the eyes of the law, the court will not embark on questioning whether the value is adequate and will not interfere with the fairness of the bargain made by the parties.

[4] The signatures of the defendant's project manager on the progress and final claims of the plaintiff would bind the defendant even if it did not read those documents in question.

[5] The plaintiff had supplied materials and performed works for the defendant and all the works had been completed. The plaintiff was entitled to be paid according to the progress and final claims.

[6] Even if it was true that the defendant was an agent to the principal, the plaintiff was still entitled to be paid. The principal could not set up want of authority on the part of the defendant as an agent to avoid honouring the contract.

[7] The issue of estoppel could also be relied upon by the plaintiff. Having received and acknowledged the progress and final claims, the defendant was estopped from denying the same.

[Appeal dismissed.]

Cases referred to:

Amanah Merchant Bank v. Lim Tow Seng & Ors [1993] 2 CLJ 635 ***(aff)***
American Express Sdn Bhd v. Dato Wong Kee Tat & Ors [1990] 1 CLJ 17 ***(aff)***
Avel Consultant Sdn Bhd v. Mohamed Zain Yusof & Ors [1985] 2 CLJ 11 ***(aff)***
Baker v. Dening [1838] 8 A&E 94 ***(aff)***
Bank Negara Malaysia v. Mohd Ismail & Ors [1992] 1 CLJ 627 ***(refd)***
Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd [1995] 4 CLJ 283 ***(foll)***
Brady v. Brady [1989] AC 755 ***(aff)***
Cheng Keng Hong v. Government of The Federation of Malaya [1966] 2 MLJ 33 ***(refd)***
Chichester v. Cobb [1866] 14 LT 433 ***(aff)***
Curtis v. Chemical Cleaning & Dyeing Co [1951] 1 All ER 631 ***(refd)***
Dyas v. Stafford [1881] 7 LR Ir 590 ***(aff)***
Gaumont-British Pictures Corp v. Alexander [1936] 2 All ER 1686 ***(aff)***
Geary v. Physic [1826] 5 B&C 234 ***(aff)***
Godwin v. Francis [1870] LR 5 CP 295 ***(aff)***
Haigh v. Brooks [1839] 10 A&E 309 ***(aff)***
Hill v. Hill [1947] Ch 231 ***(aff)***
In the Goods of Blewitt [1879] 5 PD 116 ***(aff)***
Kwong Kum Sun (S) Pte Ltd v. Lian Soon Siew & Ors [1984] 1 CLJ 201 ***(foll)***
L' Estrange v. F Graucob Ltd [1934] 2 KB 394 ***(refd)***
Lloyd's Bank Ltd v. Bundy [1975] QB 326 ***(refd)***
McBlain v. Cross [1872] 25 LT 804 ***(aff)***
Moss v. Hall [1805] 5 Exch 46 ***(aff)***
Normid Housing Association Ltd v. R John Ralphs [1989] 1 Lloyd's Rep 265 ***(aff)***
Ong & Co Pte Ltd v. Foo Sae Heng [1990] 1 CLJ 856 ***(refd)***
Phillimore v. Barry [1818] 1 Camp 513 ***(aff)***

Punca Klasik Sdn Bhd v. Seok Kim Leow [1996] 4 CLJ 399 ***(refd)***
R v. Riley [1896] 1 QB 309 ***(aff)***
Syarikat Kerjasama Serbaguna Tunas Muda Sungai Ara v. Ghazali Ibrahim [1985] 2 MLJ 225 ***(refd)***
White v. Bluett [1853] 23 LJ Ex 36 ***(aff)***

Legislation referred to:
Rules of the High Court 1980, O. 14

Other sources referred to:
Britannica World Language Dictionary, vol 2, p 2082
Construction Law in Singapore and Malaysia, 2nd edn, p 335
The Concise Oxford Dictionary, 9th edn, p 1398

For the plaintiff - Teh Ann Tong; M/s HY Lee & Hee
For the defendant - Felix Dorairaj; M/s Dorairaj, Low & Teh

Reported by S Dharmendran

JUDGMENT

Abdul Malik Ishak J:

The plaintiff, a sub-contractor to the defendant, supplied materials and performed works according to the defendant's specifications of a "hypermarket" known as "Giant Cash & Carry" at an area in the Mukim of Plentong, district of Johor Bahru, Johore. The plaintiff dutifully completed that project and as a result the defendant was said to owe the plaintiff a sum of RM325,229.16 being the balance of the works undertaken by the plaintiff at the behest of the defendant. The statement of claim in encl. 2 particularised the particulars, at para. 4, of the works undertaken by the plaintiff and the sums duly paid by the defendant. The particulars are now reproduced for easy reference:

Butir-Butir

(a) Jumlah amaun untuk kerja-kerja sub-kontrak bagi pembinaan gudang/hypermarket "Giant Cash & Carry" di kawasan Mukim Plentong, Daerah Johor Bahru, Johor.	... ...	RM490,229.16
(b) Bayaran pada 20.1.98	...	RM 50,000.00
(c) Bayaran pada 26.1.98	...	RM 30,000.00
(d) Bayaran pada 06.4.98	...	RM 65,000.00

(e) Bayaran pada 20.5.98	...	RM 20,000.00
		RM325,229.16

The plaintiff through their solicitors issued a demand notice dated 21 May 1998 to the defendant for payment of those sums but the defendant failed, refused and ignored that demand notice completely. For these reasons, the plaintiff claimed from the defendant the following (see the statement of claim in encl. 2):

(a) jumlah wang sebanyak RM325,229.16;

(b) faedah pada kadar 8% setahun atas hutang tersebut mulai dari tarikh writ saman sehingga tarikh penyelesaian penuh baginya;

(c) kos tindakan yang ditaksirkan;

(d) kos;

(e) apa-apa perintah atau relif lain yang dianggap/dapati wajar atau suaimanfaat oleh Mahkamah yang mulia ini.

The writ of summons and the statement of claim (encl. 2) were dated 10 June 1998 and filed on the same day. The defendant entered appearance on 30 June 1998 through Messrs Dorairaj, Low & Teh as reflected in encl. 4 which was filed on 2 July 1998. By way of a summons in chambers in encl. 7 dated 4 July 1998 and filed on the same day, the plaintiff through Messrs H.Y. Lee & Hee sought for summary judgment under O. 14 of the Rules of the High Court 1980 ("RHC"). That summary judgment application was supported by an affidavit of Teh Ann Chung that was affirmed on 3 July 1998 and filed on 4 July 1998 as reflected in encl. 6. Annuar Chew bin Abdullah affirmed an affidavit in reply on 17 July 1998 which was filed on 20 July 1998 as can be seen in encl. 9. By way of a reply, Teh Ann Chung affirmed an affidavit in reply on 21 July 1998 which was filed on the same day. These affidavits together with the summons in chambers in enclosure 7 finally came up for hearing before the senior assistant registrar ("SAR") on 19 August 1998 and the SAR must have been satisfied that there was no triable issue and accordingly entered judgment against the defendant. Being aggrieved, the defendant appealed to the judge in chambers as reflected in encl. 14.

It must be emphasised that the defendant has yet to file their statement of defence.

The law journals are replete with authorities on summary judgments. Suffice for this exercise that reference to some of them are made here. Thus, in an O. 14 application the defendant need only raise one triable issue acceptable to the court to enable him to defend the suit (*Amanah Merchant Bank v. Lim Tow Seng & Ors* [1993] 2 CLJ 635, [1993] 2 MLJ 241). It is said that an O. 14 application cannot be granted where the defence raises a plausible dispute (*Avel Consultant Sdn Bhd & Anor v. Mohamed Zain Yusof & Ors* [1985] 2 CLJ 11, [1985] 2 MLJ 209). But where the facts are clear and undisputed and, the only issue raised is a question of law, it is proper that it be dealt with in an O. 14 application (*American Express Sdn Bhd v. Dato Wong Kee Tat & Ors* [1990] 1 CLJ 17; [1990] 1 MLJ 91). It is now trite law that an O. 14 application is to enable a plaintiff to obtain a summary judgment without trial provided:

(1) the plaintiff can prove his claim clearly; and

(2) the defendant is unable to set up a *bona fide* defence or raise an issue against the claim which ought to be tried.

The judge must not only be satisfied that there is no defence but must also be satisfied that there is no fairly arguable point to be argued on behalf of the defendant and having so satisfied himself on these points, it is the judge's duty to give judgment to the plaintiff. I am of the considered view that there would be a fairly arguable point to be argued if the defence can raise serious questions of law or fact to resist the plaintiff's claim or it is apparent to the court, though the defence is not able to pinpoint any precise issue or question in dispute which ought to be tried, that for some reason there ought to be a trial. Mohamed Dzaiddin J (now FCJ) in *Syarikat Kerjasama Serbaguna Tunas Muda Sungai Ara v. Ghazali bin Ibrahim* [1985] 2 MLJ 225, had this to say of summary judgment at p. 226 of the report:

> The issue here is whether or not there is a triable defence. This simply means that it is for the Defendant to show on merits, he has a good defence to the claim, or that a difficult point of law is involved, or the dispute is as to the fact which is to be tried or any other circumstances showing reasonable grounds of a *bona fide* defence (See: *The Supreme Court Practice* 1985 Vol. 1 - "Defence showing cause" at p. 137).

Further down the same page of the same judgment, his Lordship Mohamed Dzaiddin J (now FCJ) said:

> However, in my opinion, this is essentially a case where the triability of the issue depends upon evidence as opposed to law. The facts and circumstances as deposed and found in the affidavits filed therein are sufficient to settle the issue. Here I would adopt the statement in the judgment of Ackner L.J. in *Banque de Paris v. de Naray* [1984] 1 Lloyd's Rep. 23 to the following effect:

> It is of course trite law that Order 14 proceedings are not decided by weighing the two affidavits. It is also trite that the mere assertion in an affidavit of a given situation which is to be the basis of a defence does not, *ipso facto*, provide leave to defend; the Court must look at the whole situation and ask itself whether the defendant has satisfied the Court that there is a fair or reasonable probability of the defendant's having a real or *bona fide* defence.

Thus, from the facts and circumstances of the case as a whole, I am satisfied that the Defendant has failed to show a *bona fide* defence to the claim. Therefore, I make an order in terms of Prayers 1, 3 and 4 of this application.

The law of summary judgment was crystallised in fine legal language by that brilliant judge, Mohamed Azmi SCJ, when his Lordship wrote the majority judgment of the Supreme Court in *Bank Negara Malaysia v. Mohd. Ismail & Ors* [1992] 1 MLJ 400 SC. In that case his Lordship in refined words said at p. 408 of the report:

> In our view, basic to the application of all those legal propositions, is the requirement under Order 14 for the court to be satisfied on affidavit evidence that the defence has not only raised an issue but also that the said issue is triable. The determination of whether an issue is or is not triable must necessarily depend on the facts or the law arising from each case as disclosed in the affidavit evidence before the court. On the treatment of conflict of evidence on affidavits, Lord Diplock speaking in the Privy Council on *Eng Mee Yong & Ors v. Letchumanan* [1979] 2 MLJ 212 had this to say at p. 217:
>
> > Although in the normal way it is not appropriate for a judge to attempt to resolve conflicts of evidence on affidavit, this does not mean that he is bound to accept uncritically, as raising a dispute of fact which calls for further investigation, every statement on an affidavit however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself it may be.
>
> Although Lord Diplock was dealing with an application for removal of caveat in that particular case, we are of the view that the principle of law is relevant and applicable in all cases where a judge has to decide a case or matter on affidavit evidence.
>
> Under an Order 14 application, the duty of a judge does not end as soon as a fact is asserted by one party, and denied or disputed by the other in an affidavit. Where such assertion, denial or dispute is equivocal, or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable in itself, then the judge has a duty to reject such assertion or denial, thereby rendering the

issue not triable. In our opinion, unless this principle is adhered to, a judge is in no position to exercise his discretion judicially in an Order 14 application. Thus, apart from identifying the issues of fact or law, the court must go one step further and determine whether they are triable. This principle is sometimes expressed by the statement that a complete defence need not be shown. The defence set up need only show that there is a triable issue.

Where the issue raised is solely a question of law without reference to any facts or where the facts are clear and undisputed, the court should exercise its duty under Order 14. If the legal point is understood and the court is satisfied that it is unarguable, the court is not prevented from granting a summary judgment merely because 'the question of law is at first blush of some complexity and therefore takes a little longer to understand'. (See *Cow v. Casey* [1949] 1 All ER 197 and *European Asian Bank AG v. Punjab & Sind Bank* [1983] 2 All ER 508 at page 516.)

With these authorities in mind, I will now proceed to examine the summary judgment application in encl. 7.

As a sub-contractor, the plaintiff entered into a contract with the defendant based on the terms as reflected in the quotation as seen in exh. "TAC 2" of encl. 6. That quotation showed the amount of RM145,000 that had been paid to the plaintiff and since the whole case revolved on this quotation it is necessary to set out that quotation in full with the annexures thereto:

TAC CONSTRUCTION & TRADING

REF : TAC/BEB/SA/004/98

DATE : 30th APRIL 1998

BENNES ENGINEERING BERHAD,
4th FLOOR LOT 271 JALAN DUA,
OFF JALAN CHAN SOW LIN,
55200 KUALA LUMPUR.

ATTN : MR. TIEW AH BOO

SUB-CONTRACT WORKS AT GIANT CASH & CARRY SDN BHD. (HYPERMARKET), MUKIM PLENTONG, DAERAH JOHOR BAHRU, JOHOR DARUL TAKZIM.

Referring to the subject mentioned above.
Attached please find the Final Claim amounting (to) RM345,229.16 for your reference and process.

WORKOUT OF ATTACHED FINAL CLAIM

Amount To Claim	:	RM490,229.16
Amount Collected	:	RM145,000.00
Balance and Amount On This Claim	:	RM345,229.16
Ringgit Malaysia	:	Three Hundred Forty Five Thousand Two Hundred Twenty Nine And Cents Sixteen Only.

Should you need any further clarification, please contact the person undersigned.

Thank you.

Yours faithfully,

TAC CONSTRUCTION & TRADING

Sgd (Illegible)
...
MR. Y.T. LEE

BY HAND
BENNES ENGINEERING BERHAD
(GIANT HYPERMARKET PLENTONG JOHOR)
RECEIVED & ACKNOWLEDGED BY:

Sgd (Illegible)
...
(Signature)
PROJECT MANAGER
...
(Full Name)

Date : ...

There are four annexures to exh. "TAC 2" of encl. 6 at pp. 004, 005, 006 and 007. The annexure at p. 004 is now reproduced hereinunder:

a PROJECT: GIANT CASH & CARRY SDN BHD. (HYPERMARKET), PLENTONG, JOHOR BAHRU.

Page No: 1/4

ITEM	DESCRIPTION	FINAL CLAIM	AMOUNT TO CLAIM (DEBIT)	AMOUNT COLLEC-TED (CREDIT)	BALANCE	REMARKS
1.	Ceiling Works For A.H.U. Room At Grid E-I/19-20	$44,606.72	$44,606.72			
2.	Ceiling Works For Mezz. Office At Grid L-M/7-10	$13,511.29	$58,118.01			
3.	Ceiling Works For Staircase	$7,000.00	$65,118.01			
4.	Ironmongery Works For Mild Steel Staircase	$21,100.00	$86,218.01			
5.	Ironmongery Works For Water Tank's Support at Mezz. Roof	$9,600.00	$95,818.01			
6.	Ironmongery Works For Boxing-up Existing Gutter At Grid C/6-19	$19,370.00	$115,188.01			
7.	Ceiling Works For A.H.U. Room At Grid J-K/1-2	$2,806.40	$117,994.41			
8.	Ceiling Works For Bank At Grid L-O/18-19	$36,411.29	$154,405.70			

b c d e f g h i

ITEM	DESCRIPTION	FINAL CLAIM	AMOUNT TO CLAIM (DEBIT)	AMOUNT COLLEC-TED (CREDIT)	BALANCE	REMARKS
9.	Ceiling Works For Mezz. Office At Grid L-M/13-15	$6,723.26	$161,128.96			
	BALANCE C/F:				$161,128.96	

BENNES ENGINEERING BERHAD
(GIANT HYPERMARKET PLENTONG, JOHOR)
RECEIVED & ACKNOWLEDGED BY:

Sgd (Illegible)
...
(Signature)

PROJECT MANAGER
...
(Full Name)
Date: ...

I will now turn to the annexure at p. 005 of encl. 6. It reads as follows:

PROJECT: GIANT CASH & CARRY SDN. BHD. (HYPERMARKET), PLENTONG, JOHOR BAHRU.

Page 2/4

ITEM	DESCRIPTION	FINAL	AMOUNT TO CLAIM (DEBIT)	AMOUNT COLLEC-TED (CREDIT)	BALANCE	REMARKS
	BALANCE B/F:				$161,128.96	
10.	Ceiling Works For Bakery's Office & Store At Grid C-D/6-7	$2,742.37	$163,871.33			
11.	Ironmongery Works For Staircase Handrail	$2,512.30	$166,383.63			

a

ITEM	DESCRIPTION	FINAL CLAIM	AMOUNT TO CLAIM (DEBIT)	AMOUNT COLLEC-TED (CREDIT)	BALANCE	REMARKS
b						
12.	Ceiling & Partition Works For Mezz. Office (Giant Ace Hardware's Office) At Grid C-E/19-21.	$20,440.25	$186,823.88			
13.	Ceiling & Partition Works For Mezz. Office (Giant's Office) At Grid G-K/1a-6	$92,450.37	$279,274.25			
14.	Ceiling Works For Toilet #3 Including Handicap And Mother's Baby Room At Grid L-M/17-19	$7,627.55	$286,901.80			
f 15.	Ceiling Works For Non Halal At Grid L-M/6-8	$8,189.87	$295,091.67			
	BALANCE C/F:				$295,091.67	

g

BENNES ENGINEERING BERHAD
(GIANT HYPERMARKET PLENTONG, JOHOR)
RECEIVED & ACKNOWLEDGED BY:

h

Sgd (Illegible)
...
(Signature)

PROJECT MANAGER
...
i (Full Name)
Date: ...

I will now proceed to reproduce the annexure at p. 006 of encl. 6: *a*

PROJECT: GIANT CASH & CARRY SDN.BHD. (HYPERMARKET), PLENTONG, JOHOR BAHRU.

Page No: 3/4 *b*

ITEM	DESCRIPTION	FINAL CLAIM	AMOUNT TO CLAIM (DEBIT)	AMOUNT COLLEC-TED (CREDIT)	BALANCE	REMARKS
	BALANCE B/F:				$295,091.67	
16.	Ceiling Works For Toilet #2 Including Handicap And Mother's Baby Room At Grid L-M/5-7	$2,841.50	$297,933.17			
17.	Ceiling Works For Fire Exits At High Racking Area	$14,669.60	$312,602.77			
18.	Ironmongery Works For Receiving Bays	$77,999.25	$390,602.02			
19.	Ironmongery Works For D.I.Y. Store At Grid D-E/19-20	$4,571.12	$395,173.14			
20.	Ceiling Works Vegetable's Office At Grid H-I/4-5	$901.24	$396,074.38			
21.	Ceiling Works For Outer Mall Toilet #1 Including Fire Control Room And Sec.4 Room At Grid O-P/ 1a-3	$23,263.45	$419,337.83			

c *d* *e* *f* *g* *h* *i*

ITEM	DESCRIPTION	FINAL CLAIM	AMOUNT TO CLAIM (DEBIT)	AMOUNT COLLEC-TED (CREDIT)	BALANCE	REMARKS
22.	Ceiling Works For Outer Mall Toilet #2 Including E.D.P. Room And Sec. 5 Room At Grid O-P/20-21	$10,660.48	$429,998.31			
	BALANCE C/F:				$429,998.31	

BENNES ENGINEERING BERHAD
(GIANT HYPERMARKET PLENTONG, JOHOR)
RECEIVED & ACKNOWLEDGED BY:

Sgd (Illegible)
...
(Signature)

PROJECT MANAGER
...
(Full Name)
Date: ...

Finally, the annexure at p. 007 of encl. 6 reads thus:

PROJECT: GIANT CASH & CARRY SDN. BHD. (HYPERMARKET),
PLENTONG, JOHOR BAHRU.

Page No: 4/4

ITEM	DESCRIPTION	FINAL CLAIM	AMOUNT TO CLAIM (DEBIT)	AMOUNT COLLEC-TED (CREDIT)	BALANCE	REMARKS
	BALANCE B/F:				$429,998.31	
23.	Additional Ironmongery Works	$9,941.00	$439,939.31			

ITEM	DESCRIPTION	FINAL CLAIM	AMOUNT TO CLAIM (DEBIT)	AMOUNT COLLEC-TED (CREDIT)	BALANCE	REMARKS
24.	Ironmongery Works For Maintenance Room At Grid A-A1/9-10	$11,700.00	$451,639.31			
25.	Carpentry Works For Fire Rated Board Boxing-up To Existing G.I. Gutter At Grid 0/6-19	$27,927.90	$479,567.21			
26.	Additional Carpentry Works	$1,190.00	$480,757.21			
27.	Ceiling & Partition Works For Cubicle Fitting Rooms	$9,471.95	$490,229.16			
	TOTAL				$490,229.16	
	Payment Received			$50,000.00		20/1/98
	Payment Received			$30,000.00		26/1/98
	Payment Received			$65,000.00		06/4/98
	GRAND TOTAL				$345,229.16	

BENNES ENGINEERING BERHAD
(GIANT HYPERMARKET PLENTONG, JOHOR)
RECEIVED & ACKNOWLEDGED BY:

Sgd (Illegible)
PROJECT MANAGER
Date: ...

The defendant found it difficult to make the necessary payments and reminders were sent to the defendant. Three reminders must be highlighted here. One was dated 15 April 1998, the other was dated 17 April 1998, and the final one was dated 25 April 1998. These three reminders will now be reproduced to show the sequence of events. The first reminder dated 15 April 1998 was worded as follows:

TAC CONSTRUCTION & TRADING

REF : TAC/BEB/ARS/001/98

DATE : 15th APRIL 1998

BENNES ENGINEERING BERHAD,
4th FLOOR LOT 271 JALAN DUA,
Off JALAN CHAN SOW LIN,
55200 KUALA LUMPUR. **A.R. REGISTERED**

RE: SUB-CONTRACT WORKS AT GIANT CASH & CARRY SDN. BHD. (HYPERMARKET) MUKIM PLENTONG, DAERAH JOHOR BAHRU, JOHOR DARUL TAKZIM

We refer to the above matter and our letter dated 15/3/98 to you.

Whilst we appreciate your recent payment for the sum of RM65,000.00 (*vide* Malayan Banking Berhad's Cheque No. 295968) towards settlement of the various Progress Claims/Certificates duly submitted earlier by us to you (and duly acknowledged and verified by your Project Manager), kindly note that the outstanding amount due as per our said letter is for the sum of RM212,531.88.

We further regret to note that there appears to be a dilatory effort on your part to have our outstanding sums settled despite all our aforesaid Progress Claims/Certificates and the work carried out and completed by us having been duly acknowledged and verified respectively by your Project Manager.

You may wish to be informed we shall continue to forward to you Progress Claims as and when the relevant part of the above-mentioned works are completed by us. Meanwhile, kindly therefore let us have your early payment for the sum of RM147,531.88 being settlement of the balance outstanding amount due and owing, thus far, to us.

Should you need any further clarification, please do not hesitate to contact the undersigned.

Thank you.

Yours faithfully
for TAC CONSTRUCTION & TRADING,

Sgd (Illegible)
...
MR. Y.T. LEE

The second reminder dated 17 April 1998 spoke of the proposed claim that had to be paid by the defendant and it was worded thus:

TAC CONSTRUCTION & TRADING

REF : TAC/BEB/SA/003/98
DATE : 17th APRIL 1998

BENNES ENGINEERING BERHAD,
4th FLOOR LOT 271 JALAN DUA,
Off JALAN CHAN SOW LIN,
55200 KUALA LUMPUR.

ATTN: MR. TIEW AH BOO

SUB-CONTRACT WORKS AT GIANT CASH & CARRY SDN. BHD. (HYPERMARKET), MUKIM PLENTONG, DAERAH JOHOR BAHRU, JOHOR DARUL TAKZIM.

Referring to the subject mentioned above.

Attached please find the Progress Claim amounting (to) RM334,567.21 for your reference and process.

WORKOUT OF ATTACHED CLAIM

Amount To Claim	:	RM479,567.21
Amount Collected	:	RM145,000.00
Balance and Amount On This Claim	:	RM334,567.21

Ringgit Malaysia : Three Hundred Thirty Four Thousand Five Hundred Sixty Seven And Cents Twenty One Only.

Should you need any further clarification, please contact the person undersigned.

Thank you.

Yours faithfully,

TAC CONSTRUCTION & TRADING

Sgd (Illegible)
...
MR. Y.T. LEE

BY HAND
BENNES ENGINEERING BERHAD
(GIANT HYPERMARKET PLENTONG, JOHOR)

RECEIVED & ACKNOWLEDGED BY:

Sgd (Illegible)
...
PROJECT MANAGER
Date: ...

The final reminder dated 25 April 1998 alluded to the lackadaisical attitude on the part of the defendant in settling the outstanding balance of RM334,567.21 notwithstanding the fact that the works had been carried out and completed by the plaintiff. The defendant too was said to have acknowledged and verified those works. That reminder was worded thus:

TAC CONSTRUCTION & TRADING

REF : TAC/BEB/ARS/002/98

DATE: 25th APRIL 1998

BENNES ENGINEERING BERHAD,
4th FLOOR LOT 271 JALAN DUA,
Off JALAN CHAN SOW LIN,
55200 KUALA LUMPUR.

A.R. REGISTERED

RE: SUB-CONTRACT WORKS AT GIANT CASH & CARRY SDN. BHD (HYPERMARKET) MUKIM PLENTONG, DAERAH JOHOR BAHRU, JOHOR DARUL TAKZIM

We refer to the above matter and our letters dated 15/4/98 and 17/4/98 to you.

We regret to note that you have yet to forward to us the requested payment towards settlement of the various Progress Claims/Certificates duly submitted earlier by us to you (and duly acknowledged and verified by your Project Manager). Kindly note that the outstanding amount due as per our said letter dated 17/4/98 is for the sum of RM334,567.21.

We regret to state again that there appears to be a dilatory effort on your part to have our outstanding sums settled despite all our aforesaid Progress Claims/ Certificates and the work(s) carried out and completed by us having been duly acknowledged and verified respectively by your Project Manager.

Kindly therefore let us have your early payment for the sum of RM334,567.21 being settlement of the balance outstanding amount due and owing, thus far, to us.

Should you need any further clarification, please do not hesitate to contact the undersigned.

Thank you.

Yours faithfully
for TAC CONSTRUCTION & TRADING

Sgd (Illegible)
...
MR. Y.T. LEE

Now, it is germane to mention that the second reminder dated 17 April 1998 was sent by hand and it was duly received and acknowledged by the defendant through its project manager. Paragraph 9 of encl. 6 described the project manager as one Tiew Ah Boo and this was admitted by the defendant through Annuar Chew bin Abdullah in encl. 9 of para. 12.

By an A.R. Registered letter dated 8 May 1998, the plaintiff drew the attention of the defendant to those three reminders reproduced above and sought for settlement of the outstanding sums that were due and owing. That A.R. Registered letter was worded as follows:

TAC CONSTRUCTION & TRADING

REF : TAC/BEB/ARS/003/98

DATE : 8th MAY 1998

BENNES ENGINEERING BERHAD,
4th FLOOR LOT 271 JALAN DUA,
Off JALAN CHAN SOW LIN,
55200 KUALA LUMPUR. A.R. REGISTERED

RE: SUB-CONTRACT WORKS AT GIANT CASH & CARRY SDN. BHD. (HYPERMARKET) MUKIM PLENTONG, DAERAH JOHOR BAHRU, JOHOR DARUL TAKZIM

We refer to the above matter and our earlier letters to you dated 15/4/98, 17/4/98 and 25/4/98 whereby we have yet to have any of your reply thereto. You have to-date also yet to remit to us any of the requested payments therein stated respectively.

You may wish to be informed that all the construction and building works in respect of the above mentioned projects has now been duly completed by us. As you will also appreciate, we have already forwarded to you all the relevant Progress Claims/Certificates in respect thereof.

In view of the nature of our industry, any further delay towards settlement of the outstanding sums due and owing to us would, we trust you will invariably agree, seriously jeopardize our business and position.

Accordingly, we would be most obliged if you could remit the total outstanding sum for RM345,229.16 to us without any further delay.

Thank you.

Yours faithfully
for TAC CONSTRUCTION & TRADING

Sgd (Illegible)
...
MR. Y.T. LEE

The demand notice from Messrs H.Y. Lee & Hee dated 21 May 1998 as alluded to in the early part of this judgment must, for completeness, be reproduced. It was worded thus:

Our Ref: TAT/GEN/NOD/98/Ed

21th May, 1998

M/s BENNES ENGINEERING BERHAD,
4th Floor, Lot 271,
Jalan Dua,
Off Jalan Chan Sow Lin,
55200 Kuala Lumpur. A.R. REGISTERED

Dear Sirs,

Re: 1. Sub-Contracts Works at Giant Cash & Carry Sdn. Bhd. (Hypermarket) Mukim Plentong, Daerah Johor Bahru, Johor Darul Takzim.

2. Outstanding Sums Due and Owing to M/s TAC Construction & Trading.

We write on the instructions of M/s TAC Construction & Trading of No. 32, Jalan Harimau Kumbang, 80250 Johor Bahru, Johor Darul Takzim.

We are instructed that our clients have duly completed all the construction and building works in respect of the above-mentioned project. We are further instructed that notwithstanding all the Progress Claims/Certificates (submitted by our clients to you) and the works carried out/completed thereto have been duly verified and acknowledged respectively by you, and despite numerous reminders by our clients thereafter, you have yet to remit the payments due to our clients thereof, particulars of which are as follows:

Particulars

(a)	Amount due for work done/completed	RM490,229.16
	LESS	
(b)	Sum received on 20/1/98	RM 50,000.00
	LESS	

(c)	Sum received on 26/1/98	RM 30,000.00
	LESS	
(d)	Sum received on 06/4/98	RM 65,000.00
	LESS	
(e)	Sum received on 20/5/98	RM 20,000.00
	Balance Outstanding	RM325,229.16

In the said premise, **TAKE NOTICE** that we are instructed to demand (which we hereby do) that you remit the said sum of RM325,229.16 to us, as Solicitors, or to our client directly within SEVEN (7) DAYS from the date of receipt of this Notice failing which our client shall have no other alternative but to seek legal redress against you to recover the same together with interest. In such latter event, you shall also be liable for all costs (including but not limited to legal costs on a solicitor and client basis) and expenses incurred as a result thereof.

TAKE FURTHER NOTICE that should any part payment(s) be made to and accepted by our clients or by us (as Solicitors) at any time, the same shall be received by our clients or by us on behalf of our clients (as the case may be) at our clients' absolute discretion and such part payment(s) shall not be deemed to be settlement of your aforesaid debt and if received, shall also be received (or had been received) thereby **without prejudice** to our clients' right to commence or continue with legal action against you.

Kindly take note and act accordingly.

Yours faithfully
for H.Y. LEE & HEE

Sgd (Illegible)
TEH ANN TONG

c.c. Client.

It was the plaintiff's stand that there was a contract subsisting between the parties. The annexures at pp. 008 to 095 of exh. "TAC 2" of encl. 6 relate to several progress and final claims of the plaintiff. These annexures are too voluminous to be reproduced in this judgment and suffice for this exercise that brief references to some of them will now be made:

(1) Page 008 dated 23 December 1997 for progress claim for A.H.U. Room at Grid E-I/19-20, total amount RM44,606.72, for the attention of Tiew Ah Boo and received and acknowledged by the project manager of the defendant's company.

(2) Page 010 dated 20 April 1998 for final claim for A.H.U. Room at Grid E-I/19-20, total amount RM44,606.72, for the attention of Tiew Ah Boo and received and acknowledged by the project manager of the defendant's company.

(3) Page 012 dated 26 December 1997 for progress claim for Mezzanine Office at Grid L-M/7-10, total amount RM13,511.29, for the attention of Tiew Ah Boo and received and acknowledged by the project manager of the defendant's company.

(4) Page 013 dated 20 April 1998 for final claim for Mezzanine Office at Grid L-M/7-10, total amount for RM13,511.29, for the attention of Tiew Ah Boo and received and acknowledged by the project manager of the defendant's company.

(5) Page 014 dated 26 December 1997 for progress claim for staircase, total amount RM7,000 for the attention of Tiew Ah Boo and received and acknowledged by the project manager of the defendant's company.

(6) Page 016 dated 20 April 1998 for final claim for staircase, total amount RM7,000, for the attention of Tiew Ah Boo and received and acknowledged by the project manager of the defendant's company.

(7) Page 018 dated 26 December 1997 for progress claim for mild steel staircase, total amount RM21,000, for the attention of Tiew Ah Boo and received and acknowledged by the project manager of the defendant's company.

(8) Page 019 dated 20 April 1998 for final claim for mild steel staircase, total amount RM21,000, for the attention of Tiew Ah Boo and received and acknowledged by the project manager of the defendant's company.

(9) Page 020 dated 3 January 1998 for progress claim for water tank's support at Mezzanine Roof, total amount RM9,600, for the attention of Tiew Ah Boo and received and acknowledged by the project manager of the defendant's company.

(10) Page 021 dated 20 April 1998 for final claim for water tank's support at Mezzanine Roof, total amount RM9,600, for the attention of Tiew Ah Boo and received and acknowledged by the project manager of the defendant's company.

(11) Page 022 dated 10 January 1998 for revised claim no: 1 for boxing-up existing UPVC gutter at Grid C/6-19, total amount RM19,370, for the attention of Tiew Ah Boo and received and acknowledged by the project manager of the defendant's company.

(12) Page 023 dated 20 April 1998 for final claim for boxing-up existing UPVC gutter at Grid C/6-19, total amount RM19,370, for the attention of Tiew Ah Boo and received and acknowledged by the project manager of the defendant's company.

(13) Page 024 dated 10 January 1998 for progress claim for A.H.U. room at Grid J-K/1-2, total amount RM1,400, for the attention of Tiew Ah Boo and received and acknowledged by the project manager of the defendant's company.

(14) Page 026 dated 26 January 1998 for progress claim no: 2 for A.H.U. room at Grid J-K/1-2, total amount RM2,806.40, for the attention of Tiew Ah Boo and received and acknowledged by the project manager of the defendant's company.

(15) Page 028 dated 20 April 1998 for final claim for A.H.U. room at Grid J-K/1-2, total amount RM2,806.40 for the attention of Tiew Ah Boo and received and acknowledged by the project manager of the defendant's company.

(16) Page 030 dated 26 December 1997 for progress claim for bank at Grid L-O/18-19, total amount RM27,900 for the attention of Tiew Ah Boo and received and acknowledged by the project manager of the defendant's company.

(17) Page 032 dated 26 January 1998 for progress claim no: 2 for bank at Grid L-O/18-19, total amount RM36,411.29 for the attention of Tiew Ah Boo and received and acknowledged by the project manager of the defendant's company.

(18) Page 034 dated 20 April 1998 for final claim for bank at Grid L-O/18-19, total amount RM36,411.29 for the attention of Tiew Ah Boo and received and acknowledged by the project manager of the defendant's company.

(19) Page 036 dated 26 December 1997 for progress claim for mezzanine office at Grid L-M/13-15, total amount RM4,500 for the attention of Tiew Ah Boo and received and acknowledged by the project manager of the defendant's company.

(20) Page 037 dated 13 February 1998 for progress claim no: 2 for mezzanine office at Grid L-M/13-15, total amount RM6,723.26 for the attention of Tiew Ah Boo and received and acknowledged by the project manager of the defendant's company.

(21) Page 038 dated 20 April 1998 for final claim for mezzanine office at Grid L-M/13-15, total amount RM6,723.26 for the attention of Tiew Ah Boo and received and acknowledged by the project manager of the defendant's company.

The balance of the progress and final claims also relate to the works undertaken by the plaintiff payable by the defendant. There is one common denominator to all these progress and final claims: they were served by hand to the defendant.

The Court of Appeal in Singapore had to consider the issue of whether there was a binding contract in the context of a claim for payment for work done and materials supplied in the case of *Kwong Kum Sun (S) Pte Ltd v. Lian Soon Siew & Ors* [1984] 1 MLJ 150 and Sinnathuray J delivering the judgment of the court said at p. 151:

> The appeal arose from a claim by the appellants for the sum of $11,835.01 for work done and glass materials supplied to the respondents, the main contractors for a Housing & Development Board ("HDB") project at Jalan Eunos. The respondents counter-claimed for the sum of $9,011.00 for the additional costs paid to another contractor to complete the works and the sum of $104,370.00 being liquidated damages paid by the respondents to the HDB. Lai, J. gave judgment for the respondents against the appellants for the sum of $73,479.89 and costs. At the conclusion of the hearing of the appeal, we dismissed the appeal with costs. We now give our reasons.
>
> On March 13, 1976, the HDB awarded a contract to the respondents, a firm of building contractors, to build eight blocks of single storey workshops, an electrical substation and two transformer rooms at Jalan Eunos. The respondents agreed to complete the project on February 8, 1977 unless extensions were granted by the HDB.
>
> On April 15, 1976, the appellants, a company carrying on business as importers of glass sheets and engaged as glazing contractors, wrote to the respondents a letter offering to supply and install glass for the project. The respondents on the same day notified their confirmation and acceptance of the offer on the letter itself. A ground of appeal was that the learned judge had wrongly held that the letter had created a binding contract between the parties when on the evidence he should have found that the letter was an invitation to treat. It is therefore necessary to set out the letter in full. It reads as follows:

Our Ref : KKS/SLH/Q/0125/76

April 15, 1976

Messrs Suan Lian Huat Construction,
248-B, Geylang Road,
Singapore 14.

Re: 8 Blocks Single Storey Workshops (74 Units) and 2 Electric Sub-Station And Transformer Rooms At Jalan Eunos, Contract 1

We thank you for your enquiry and have pleasure in submitting our prices for the supply and fixing of glass to louvres as follows:-

1. 6mm Obscured Wired Glass Fixed To Louvres @ per sq. ft. $0.95.

2. 6mm Obscured Wired Glass Fixed To Panels With Putty @ sq. ft. $1.15.

We hope that the above prices are acceptable to you and shall be grateful if you will kindly sign and return the duplicate copy of this letter to us for our records.

Yours faithfully,

KWONG KUM SUN (S) PTE LTD
GLASS DIVISION

(Sgd.) Gan Chee Siong,
Gan Shee Siong,
Manager.

GCS/bc

We confirm acceptance of the above SUAN LIAN HUAT CONSTRUCTION.

(Sgd.) Lian Soon Siew,
Signature & Chop.

The submission for the appellants was that the letter was vague, it did not contain all the terms of the contract, specifically it did not contain an agreement between the parties as to the quantity of glass to be supplied by the appellants to the respondents, nor did it specify the time as to the delivery and installation of the glass to be supplied. Counsel for the appellants relied on the proposition: 'To constitute a binding contract there must be a concluded bargain, and a concluded contract is one which settles everything that is necessary to be settled and leaves nothing to be settled by agreement between the parties.': see *Halsbury's Laws of England*, 4th Edition, Volume 9, page 139 paragraph 261.

> We rejected this submission. We were of the view that the law applicable to the facts in this case is the statement, following on the proposition cited by counsel in *Halsbury's*, which is supported by many reported cases (see footnote 2 of paragraph 261, *supra*) that the general rule relating to the creation of a binding agreement is that 'for the parties to be bound they must have finished reaching an agreement, so that it is possible to infer an intention on the part of both of them to be bound immediately'.

In my judgment all the progress and final claims showed that the parties have "finished reaching an agreement" and the only thing left for the plaintiff to do was to collect the payments thereto.

The defendant held a contrary view to that of the plaintiff. It was the defendant's stand that the terms of the contract were oral in nature and that there were terms and conditions of engagement between the parties. At para. 7 of encl. 9, the terms and conditions of the engagement were amply set out and they are now reproduced hereinunder:

> (a) the defendant issues instructions to the plaintiff who then immediately upon receipt of the instructions submit their quotation prior to the commencement of the works for the defendant's approval;
>
> (b) upon approval, the plaintiff would carry out the works and submit their claims to the defendant progressively;
>
> (c) the defendant upon receipt of the plaintiff's claims would then verify the works by way of remeasuring the works either on site or by way of drawings;
>
> (d) upon completion of condition (c) as above, the defendant would then submit the claims to the consultant who would then certify the claims and the client/owner would then make the necessary payments;
>
> (e) upon receipt of the payment from the client/owner, the defendant would then transmit that payment to the plaintiff;
>
> (f) a sum representing 10% would be retained by the defendant for defective liability;
>
> (g) it was said that the parties agreed that the plaintiff would only be paid when the defendant received payment from the client/ owner less the 10% as stated in condition (f);
>
> (h) with regard to the variation works (which was a substantial portion of the plaintiff's claim), it was said that the variation works required to be verified by the consultant's clerk of works at site, the quantity surveyor during the monthly evaluation and then certified by the architect.

The plaintiff, of course, filed an affidavit in reply in encl. 11 and at para. 4 thereof denied totally the defendant's version at para. 7 of encl. 9 and repeated the averment in para. 8 of encl. 6, namely, that the contract was on a quotation basis. The consideration here was more than adequate.

The law does not require the court to be concerned whether adequate value has been given (*Haigh v. Brooks* [1839] 10A. & E. 309, 320; *Moss v. Hall* [1805] 5 Exch. 46, 49-50; *Brady v. Brady* [1989] AC 755, 775; and *Normid Housing Association Ltd v. R. John Ralphs* [1989] 1 Lloyd's Rep. 265, 272), and the law too is not concerned whether the agreement is harsh or one-sided (*Gaumont-British Pictures Corp v. Alexander* [1936] 2 All ER 1686). That would be the general rule and in the absence of some other factors, the courts would enforce a promise so long as some value for it has been given. As Lord Denning M.R. said in *Lloyd's Bank Ltd v. Bundy* [1975] QB 326, 336:

> ... no bargain will be upset which is the result of the ordinary interplay of forces.

Put in a different way, if what is given in exchange for the promise has value in the eyes of the law, the court will not embark on questioning whether the value is adequate and will not interfere with the fairness of the bargain made by the parties. But one thing is certain, the consideration provided must be sufficient and must be capable of expression in economic terms (*White v. Bluett* [1853] 23 LJ Ex. 36).

Now, reverting back to the signatures of the project manager of the defendant's company on the progress and final claims of the plaintiff as alluded to earlier those signatures would bind the defendant even if they did not read those documents in question. As Denning L.J. said in *Curtis v. Chemical Cleaning and Dyeing Co.* [1951] 1 All ER 631, "his signature is irrefragable evidence of his assent to the whole contract, including the exempting clauses, unless the signature is shown to be obtained by fraud or misrepresentation." There is also a passage in the judgment of Scrutton LJ in *L'Estrange v. F. Graucob Ltd* [1934] 2 KB 394 that merits reproduction. There his Lordship said:

> When a document containing contractual terms is signed, then, in the absence of fraud, or, I will add, misrepresentation, the party signing it is bound, and it is wholly immaterial whether he has read the document or not.

The facts in *L'Estrange v. F. Graucob Ltd (supra)* may be stated as follows. There the plaintiff bought an automatic cigarette vending machine from the defendants. She signed an order form which contained the following term in small print, "any express or implied condition, statement or warranty, statutory or otherwise not stated herein is hereby excluded." The defendants gave her a printed confirmation of this order. When the machine was delivered it did

not work satisfactorily and the plaintiff sought damages for breach of the implied statutory term that the machine was fit for the purpose for which it was sold. The defendants sought to rely on the exemption clause, but the plaintiff argued that she had not read the order form and did not know what it contained. It was held that as the plaintiff had signed the written contract and had not been induced to do so by any misrepresention, she was bound by its terms. It was wholly immaterial that she had not read the document and did not know its contents. Factually speaking *L'Estrange v. F. Graucob Ltd (supra)* are poles apart from the present case. Even the facts in *Curtis v. Chemical Cleaning and Dyeing Co. (supra)* are different from the present case. There the plaintiff took a white satin wedding dress to the defendants' shop to be cleaned. The shop assistant asked her to sign a "receipt", which in fact contained a condition excluding the defendants' liability for any damage however arising. When the plaintiff asked why she had to sign, the assistant told her that the defendants would not accept liability for damage to the beads and sequins with which the dress was trimmed. The plaintiff signed. When the dress was returned it was stained. The defendants argued that the clause excluded their liability. It was held that the defendants could not rely on the exemption clause because of the assistant's innocent misrepresentation which had misled the plaintiff as to the extent of the exemption and thereby induced her to sign the receipt. In the present case there was no exemption clause but the principles expounded in *Curtis v. Chemical Cleaning and Dyeing Co (supra)* and *L'Estrange v. F. Graucob Ltd (supra)* are germane to the present case and should be vigorously applied thereto. But the defendant through Mr. Felix Dorairaj argued that there were two rubber stamps one superimposed over the other and he drew the court's attention to p. 020 of encl. 6. I have since perused that page in question and am satisfied that there were no two rubber stamps superimposed over the other. Rather it was the case of the rubber stamp marks that were embossed too close to one another. At any rate, it was argued by Mr. Teh Ann Tong, learned counsel for the plaintiff, that the issue of rubber stamps was not even raised in the pleadings at all. The statement of claim was silent in regard to the issue of rubber stamps. Enclosure 9 para. 11(b) of the affidavit in reply of Annuar Chew bin Abdullah contained the following sentence:

> the stamp of the defendant and signature of the defendant has been superimposed by another stamp which does not belong to the defendant.

and this was argued in the context of p. 020 of encl. 6. There was an averment in encl. 6 to the effect that I have to view the exhibits in "TAC 2" and "TAC 3" of encl. 6 with "suspicion". To me there is nothing suspicious about exhs. "TAC 2" and "TAC 3" of encl. 6. *The Shorter Oxford English Dictionary On Historical Principles* combined with *Britannica World Language Dictionary*,

vol. 2 at p. 2082 defined "superimpose" as "to impose or place (one object) on or upon another; to lay above or on the top." *The Concise Oxford Dictionary,* 9th edition, thumb index edition at p. 1398 explained that the word "superimpose" is usually followed by "(on) lay (a thing) on something else." As I said the rubber stamp marks were embossed too close to one another and not on top of one another. Of crucial importance, in so far as the exhibits in "TAC 2" and "TAC 3" of encl. 6 are concerned, would be the signatures of the project manager found therein and the defendant did not dispute these signatures at all. I must say something about signatures generally. The case of *Geary v. Physic* [1826] 5B. & C. 234 establishes beyond doubt that even a signature by pencil is sufficient. The signature appearing on a telegraph form can even be considered to be sufficient and this found favour in at least three old vintage cases. Firstly, *Godwin v. Francis* [1870] LR 5 CP 295. Secondly, *McBlain v. Cross* [1872] 25 LT 804. Thirdly, *R v. Riley* [1896] 1 QB 309, 313. Then there is the principle that a signature by means of a mark is also considered as sufficient (*Baker v. Dening* [1838] 8 A. & E. 94 (signature of a will), and *Dyas v. Stafford* [1881] 7 LR Ir. 590). Signatures by initials have also been considered to be clearly sufficient (*In the Goods of Blewitt* [1879] 5 PD 116 (signature of will); *Phillimore v. Barry* [1818] 1 Camp. 513; *Chichester v. Cobb* [1866] 14 L.T. 433; and *Hill v. Hill* [1947] Ch. 231, 240).

It is germane to mention that the defendant did not exhibit a single document to support their case. Enclosure 9 contained averments with no supporting documentary proofs at all. There were at least five previous payments made by the defendant to the plaintiff without complying with the procedures set out by the defendant in para. 7 of encl. 9. These payments were made unconditionally. It would be correct to say that the defendant was desperately seeking for a defence. In *Ong & Co Pte Ltd v. Foo Sae Heng* [1990] 2 MLJ 85, on a different set of facts, the Singapore High Court remarked at p. 87 of the report:

> The defendant had failed to show any such basis. A bald allegation would not do. Many letters were written by the plaintiffs to the defendant requiring him to top up his margin account. These were ignored. A final letter of demand of 2 July 1986 which also threatened that the matter would be referred to their solicitors brought no reply or contention to the contrary. I was satisfied that the defendant had no defence and was desperately fishing for one. He was only seeking to delay judgment. Accordingly, I dismissed the appeal with costs.

The learned authors of a book entitled *"Construction Law in Singapore and Malaysia",* 2nd edition at p. 335 described the method of payment on completion of certain works in this way:

> Payment at completion is normal in small-scale domestic or renovation works, particularly where contractual formalities are minimal. This is the requirement in an 'entire' contract, whether 'completion' is taken to be 'entire' or 'substantial'. The achievement of completion is the condition precedent to the right to payment, any earlier 'payments on account' being considered as repayable advances to be set-off against the total finally becoming due.

and this was how the plaintiff sought payments from the defendant as evidenced by the progress and final claims alluded to earlier. Incidentally, the defendant did not dispute receiving all the progress and final claims. At para. 7 of encl. 9, the defendant alluded to the submission of the plaintiff's claims to the consultant who would then certify the claims and the client/owner would then make the necessary payments. The defendant too alluded to the procedure that upon receipt of the payment from the client/owner, the defendant would then transmit that payment to the plaintiff. It seems to me that the defendant was trying to portray itself as an agent. The law of agency has been lucidly laid down by Raja Azlan Shah J (as His Majesty then was) in *Cheng Keng Hong v. Government of The Federation of Malaya* [1966] 2 MLJ 33, particularly at p. 36 thereof:

> The general proposition of law on agency by 'holding out' was stated by the Privy Council in *Attorney-General for Ceylon v. A.D. De Silva* [1953] AC 461 at p. 479.
>
> > All 'ostensible' authority involves a representation by the principal as to the extent of the agent's authority. No representation by the agent as to the extent of his authority can amount to a 'holding out' by the principal.
>
> This brings me to section 190 of the Contracts (Malay States) Ordinance, 1950, which enacts that where a principal induces a belief that the unauthorised acts of an agent are authorised he is bound by the consequences. The section reads:
>
> > When an agent has, without authority, done acts or incurred obligations to third persons on behalf of his principal, the principal is bound by such acts or obligation if he has by his words or conduct induced such third persons to believe that such acts and obligations were within the scope of the agent's authority.
>
> For the section to apply there must be an allegation or proof that the principal either by his words or conduct has induced a third person to believe that the acts done or obligations are within the scope of the agent's authority: *Lakshmi Narainsingha Swami v. Patta Sahuani* AIR 1957 Orissa 86. The section enacts a rule of estoppel. Lord Cranworth observed in *Ramsden v. Dyson* 14 WR 926 at page 933:

> If, indeed the principal knows that persons dealing with his agent have so dealt in consequence of their believing that all statements made by him had been warranted by the principal and, knowing this, allows the person so dealing to spend money in the belief that the agent had an authority, which, in fact, he had not, it may be that in such a case a Court of Equity would not allow the principal afterwards to set up want of authority in the agent.

The Privy Council case of *Ram Pertab v. Marshall* [1899], ILR 26 Cal. 701 which, however, was not decided with reference to the section, affords a guiding illustration. In that case the principal was held liable upon a contract entered into by his agent in excess of his authority, the evidence showing that the contracting party might honestly and reasonably have believed in the existence of the authority to the extent apparent to him.

Applying the law to the present case, I find that although Hewish had no authority to sign the said letter for the Chief Architect the respondents had by their conduct represented or permitted to be represented to the applicant that Hewish had the authority to act on their behalf and consequently the respondents are bound by his acts to the same extent as if he had the authority. In the circumstances the respondents are estopped from disputing the authority of Hewish.

This was a simple and straightforward case of a contract by way of a quotation between the plaintiff and the defendant. The plaintiff had supplied materials and performed works for the defendant and all the works have been completed. The plaintiff was entitled to be paid according to the progress and final claims. Five payments were effected and the plaintiff expected to be paid for the balance. Indeed if it was true that the defendant was an agent to the principal, the plaintiff was still entitled to be paid. The principal cannot set up want of authority on the part of the defendant as an agent to avoid honouring the contract.

Another point worthy to note would be the issue of estoppel that can be relied upon by the plaintiff. Having received and acknowledged the progress and final claims, the defendant was estopped from denying the same. Gopal Sri Ram JCA in *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331, 345 said:

> We would add that it is wrong to apply the maxim 'estoppel may be used as a shield but not a sword' as limiting the availability of the doctrine to defendants alone. Plaintiffs too may have recourse to it. The true nature of the doctrine in this context is that stated by Lord Russell of Killowen in *Dawsons Bank v. Nippon Menkwa Kabushiki Kaisha* LR 62 IA 100 at page 108:

> Estoppel is not a cause of action. It may (if established) assist a plaintiff in enforcing a cause of action by preventing a defendant from denying the existence of some fact essential to establish the cause of action, or (to put it in another way) by preventing a defendant from asserting the existence of some fact the existence of which would destroy the cause of action.

Further down the same page of the same judgment, his Lordship Gopal Sri Ram JCA continued:

> The width of the doctrine has been summed up by Lord Denning in the *Amalgamated Investment* case [1982] 1 QB 84 at p. 122; [1981] 3 All ER 577 at p. 584; [1981] 3 WLR 565 at p. 575 as follows:
>
> > The doctrine of estoppel is one of the most flexible and useful in the armoury of the law. But it has become overloaded with cases. That is why I have not gone through them all in this judgment. It has evolved during the last 150 years in a sequence of separate developments: proprietary estoppel, estoppel by representation of fact, estoppel by acquiescence, and promissory estoppel. At the same time it has been sought to be limited by a series of maxims: estoppel is only a rule of evidence, estoppel cannot give rise to a cause of action, estoppel cannot do away with the need for consideration, and so forth. All these can now be seen to merge into one general principle shorn of limitations. When the parties to a transaction proceed on the basis of an underlying assumption – either of fact or of law – whether due to misrepresentation or mistake makes no difference – on which they have conducted the dealings between them – neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands.

All the preliminary requirements of the summary judgment application have been complied with. At the end of the day, the defendant failed to show a triable issue and, consequently, the appeal in encl. 14 must be dismissed with costs. In *Punca Klasik Sdn Bhd v. Seok Kim Leow* [1996] 5 MLJ 241, 259, I did say the following and they must surely apply to the factual matrix of the present case:

> Seah F.J. (as he then was) in *National Company For Foreign Trade v. Kayu Raya Sdn Bhd* [1984] 2 MLJ 300, FC at page 301, laid down the requirements for an Order 14 application in these words:
>
> > For the purpose of an application under Order 14 the preliminary requirements are:

(i) the defendant must have entered an appearance;

(ii) the statement of claim must have been served on the defendant; and

(iii) the affidavit in support of the application must comply with the requirements of Order 14, rule 2.

All these three requirements have been fulfilled in the present case and the onus was therefore shifted to the defendant to satisfy this court why judgment should not be given against him. As Seah FJ (as he then was) said in the same case at p. 302:

> If the plaintiff fails to satisfy either of these considerations, the summons may be dismissed. If however, these considerations are satisfied, the plaintiff will have established a *prima facie* case and he becomes entitled to judgment. The burden then shifts to the defendant to satisfy the court why judgment should not be given against him (see Order 14 rule 3 and rule 4(i)).

On affidavit evidence especially the affidavit of Mr. Awtar Singh in enclosure 27 there was nothing to show that there was a triable issue that would compel me to order a trial.

Incidentally, *Punca Klasik Sdn Bhd v. Seok Kim Leow (supra)* was also reported in another popular law journal, namely, the Current Law Journal *vide* [1996] 4 CLJ 399. Now, without a triable issue there was nothing to compel me to order a trial. Summary judgment should go against the defendant as ordered by the SAR.

a

b **This pages is intentionally left blank**

c

d

e

f

g

h

i